IN RE LETZ BOOGIE TIMBER SALE

IBLA 86-227 Decided April 25, 1988

Appeal from a decision of the District Manager, Eugene District Office, Oregon, Bureau of Land Management, denying a protest of proposed timber sale OR-090-TS85-56.

Affirmed.

1. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales--Timber Sales and Disposals

The Board will affirm a decision to proceed with a pro- posed timber sale when the record indicates that BLM adequately considered all relevant factors and appel- lant has failed to meet its burden of showing error in BLM's decision.

APPEARANCES: Curtin Mitchell, Lorane, Oregon, for appellant; Melvin D. Clausen, District Manager, Eugene District Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

S.T.A.N.D. (Save Trees Against Needless Destruction) has appealed from a decision of the District Manager, Eugene District Office, Oregon, Bureau of Land Management (BLM), dated September 17, 1985, denying S.T.A.N.D.'s protest of the proposed Letz Boogie timber sale, OR-090-TS85-56. This timber sale proposal called for the removal of 7,232 million board feet (MBF) of timber from 133 acres of land (Tract E-85-35) situated in sec. 19, T. 20 S., R. 5 W., Willamette Meridian, Oregon, by means of clearcut (132 acres) and partial cut (1 acre). 1/ The sales tract contains three units of 46, 45, and 51 acres, respectively.

In May 1984, the Lorane Resource Area Office, BLM, prepared an envi- ronmental assessment (EA) to consider the proposed timber sale plan for

1/ Appellant's notice of appeal was filed with BLM on Oct. 18, 1985. A request that this Board stay the decision was attached to the notice. By order dated Jan. 16, 1986, the Board denied the request for a stay because appellant had not demonstrated "probable success on the merits."

fiscal year 1985. The plan called for clearcutting of 1,372 acres and commercial thinning of 185 acres in the general area of the sale now in question. The sales plan described 30 sales units, including the three involved in the Letz Boogie timber sale, and contemplated a total timber harvest of 56.7 MBF. The EA addressed the environmental impact of the proposed timber sales, and incorporated relevant portions of a previous analysis of the Eugene District's proposed 10-year timber management plan and various alternatives which had been set out in the May 1983 Eugene Timber Management Final Environmental Impact Statement (FEIS).

In a Decision Record, dated July 2, 1985, the Acting Lorane Resource Area Manager decided to offer the three units involved in this appeal for timber sale. The decision also set forth site-specific mitigation measures as well as mitigation measures previously incorporated in the project design features of the September 1983 Eugene Timber Management Plan Record of Decision (ROD), which had in turn adopted the Eugene District's proposed 10-year timber management plan considered in the FEIS. The Area Manager concluded that, taking into consideration the mitigation measures set out in the decision, the proposed timber sale would have "no significant adverse impacts * * * [on] the human environment other than those already addressed in the [FEIS]," and that no additional EIS was necessary.

On August 8, 1985, appellant filed a protest, challenging the proposed timber sale to the extent that it would involve clearcutting of "old growth timber stands." Appellant noted various alleged "deficiencies" in the pro- posal, and requested either cancellation of the sale or correction of the deficiencies. In his September 1985 decision denying appellant's protest, the District Manager addressed each of the concerns expressed in the protest filed by appellant. In its statement of reasons (SOR) for appeal from the District Manager's decision, appellant has essentially reiterated the same issues raised in its protest. We will address the issues seriatim.

Appellant's principal contention is that the proposed timber sale would violate the September 26, 1983, agreement between the State Director, BLM, and the Oregon Department of Fish and Wildlife (ODFW), entitled "BLM-ODFW Agreement for Spotted Owl Habitat Management on BLM Lands in Western Oregon" (September agreement), to the extent that the parties agreed that "spotted owl habitat shall be managed by BLM to maintain viable populations by utilizing the best available scientific information to prevent serious depletion of this indigenous species of wildlife" 2/ (Exh. A, SOR). The

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2/ Appellant also argues that the September 1983 agreement is "inadequate" because it was not based on an EA of "old growth ecosystems" or the spotted owl, and that the level of protection envisioned by the agreement would probably result in the extinction of the spotted owl. See FEIS, at 27, 31-32, 54, 58, 65-67. The basis for this contention is a report prepared by Russell Lande (Exh. B, SOR). See SOR at 1. However, we cannot draw a conclusion from the report that the 10-year timber management plan adopted by the Eugene District poses a threat to the species, or that the target set in the September 1983 agreement would not result in the establishment

northern spotted owl is on the Federal list of sensitive species and on the state list of threatened species. Appellant contends that the sale area, specifically units 1 and 2 situated in sec. 19, are a "critical" part of the Eugene District's overall spotted owl management objectives (SOR at 4).

In particular, appellant states that in the ROD, at page 11, the Dis- trict Manager, with the concurrence of the State Director, concluded that, under the adopted 10-year timber management plan for the Eugene District, the "[h]abitat of northern spotted owls will be reduced, but adequate habitat for 13 pairs will be maintained through the decade, based on the original habitat recommendations of the Oregon Endangered Species Task Force." 3/ However, appellant points out that in 1985 the Eugene District had only 10 pairs of spotted owls within the designated Spotted Owl Manage- ment Area (SOMA) (Exh. I, SOR). Appellant argues that the protection of the sales area "will bring BLM closer to compliance with * * * the ROD" (SOR at 5).

Appellant points to a June 22, 1984, recommendation by the ODFW that "[u]ntil an interagency spotted owl plan has been approved by all," BLM specifically protect the sale area "as you would a managed [1,000-acre] SOMA" because "there is a currently active breeding pair of spotted owls in Section 19" 4/ (Exh. F, SOR at 4). Appellant notes that this pair was
present but was not nesting in sec. 19 in 1984, and had completely left sec. l9 in 1985. See Exhs. L and N, SOR. Appellant also refers to a September 6, 1985, recommendation by the Director, ODFW, that BLM establish a minimum of 130 SOMA's in western Oregon, including a SOMA which would include sec. 19 (Exh. I, SOR at 4). Appellant contends that BLM has ignored the ODWF recommendation, in violation of the September 1983 agreement.

In response to these objections, BLM states that the ROD does not com- mit the Eugene District to protect "any specific number of spotted owls," but to protect "the habitat needed to support 13 spotted owls." BLM notes that this commitment was in accordance with the September 1983 agreement

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fn 2 (continued)
of a minimum viable population of spotted owls in western Oregon. See Headwaters, Inc., 101 IBLA 234 (1988), for subsequent developments in this area.

3/ Appellant contends that BLM had originally proposed to protect 23 pairs of spotted owls. See also Exh. F, SOR at 1. However, as noted in Curtin Mitchell, 82 IBLA 275, 278-79 (1984), the District had provided for the protection of 23 pairs of spotted owls on an interim basis pending the development of the final timber management plan. Following the September 1983 agreement, BLM's commitment was to protect the habitat sufficient to support 13 pairs of owls.

4/ Appellant argues that the "best available scientific information" indicates that the spotted owl requires a minimum of 1,000 acres of high-quality old-growth habitat per pair. See, however the discussion of habitat requirements in Headwaters, Inc., supra at 241-46.

under which the State Director, BLM, agreed to "manage the habitat to main- tain a population of 90 pairs of spotted owls, with appropriate distribu- tion of pairs, as a contribution to maintaining a minimum viable population in western Oregon" (Response at 2; Exh. A, SOR). BLM argues that it had acted in cooperation with ODFW to fulfill its commitment to protect spotted owl habitat on BLM-administered lands, including considering protection of the sales area as a SOMA. BLM disputes appellant's contention that BLM simply ignored the ODFW recommendations, and notes that the potential Letz Creek SOMA, mentioned in the September 1985 ODFW recommendation, did not include the sales area. See, Attachment E, Response.

We note that "ODFW and BLM biologists did make initial recommendations to postpone the sale until further analysis of habitat needs had been done" (Response at 3). This statement is supported by an October 5, 1983, memo- randum to the Lorane Resource Area Manager from the District wildlife biol- ogist which stated that the sales area was "in habitat needed to meet the District's original allocation of spotted owl habitat under the 90 pair (BLM) commitment for western Oregon." The District wildlife biologist recommended that sales in the area "be deferred * * * pending final habitat allocation to BLM Districts by joint BLM/ODF&W efforts as provided by the September 26 Agreement." Id. However, in a subsequent memorandum written by the same District wildlife biologist on January 11, 1985, he notes sub- sequent studies and states that, although the sale area was "located within my previously mapped habitat for this SOMA, Units No. 1 and 2 are in rela- tively low quality habitat due to stand age and previous mortality salvage operations. * * * Adequate habitat could be maintained for one (1) pair of owls if these units were logged as currently planned" (Attachment B, Response).

The District wildlife biologist also stated that another portion of sec. 19, which was also being considered for timber sale at the time of the memorandum, "contained some of the best habitat in the Letz Creek potential SOMA and should be protected pending a final decision by ODF&W." Id. The record indicates that this portion of sec. 19 was subsequently excluded from the proposed timber sale. See Memorandum to the file from Lorane Forest Management Specialist, dated Dec. 2, 1985, at 2.

BLM has also submitted a December 10, 1985, affidavit of Charles Bruce, a wildlife biologist with ODFW, which states that following this revision there is sufficient habitat "in excess of 1,000 acres available to the pair of owls inhabiting the Letz Creek potential SOMA," specifically, secs. 23, 24, and 25, T. 20 S., R. 6 W., Willamette Meridian. 5/ The affidavit con- cludes: "The Oregon Department of Fish and Wildlife's concerns were amelio-rated with the revised sales plan and the analysis of the remaining habitat. Consequently, the Eugene District is in complete accord with the 1983 agreement with the Oregon Department of Fish and Wildlife." See also

5/ The December 1985 affidavit also states that this area "is believed to be a new activity center * * * selected by the owls following loss of the old nest tree (to wind throw) in Section 19" (Attachment C, Response).

Attachment D, Response. BLM concludes that "BLM and ODFW biologists con- curred that the Letz Creek Potential SOMA was viable without the inclusion of the Letz Boogie Timber Sale" (Response at 4).

[1] There can be no question that when it entered into the September 1983 agreement with ODFW, BLM made a commitment to manage spotted owl habitat under its control in western Oregon in a manner that would permit the maintenance of a minimally viable population of spotted owls, or that the minimum population was considered to be 90 pairs at the time of the agreement. In addition, when issuing the ROD, the District Manager commit- ted to maintain a sufficient habitat to maintain 13 pairs in the Eugene District. However, the Eugene District did not commit to an obligation to assure the presence of 13 pairs of spotted owls. It committed to maintain "adequate habitat" to support 13 pairs (ROD at 11).

As can be seen from the evidence, the District office was responsive to ODFW concerns regarding the protection of the sales area as a potential SOMA. It is clearly reflected in the deletion of a portion of the sales area. 6/ Appellant has failed to demonstrate that there has been a lack of cooperation between BLM and ODFW in the implementation of the September 1983 agreement. 7/ See Attachment A, Response. There is also no evidence that either ODFW or BLM wildlife specialists believed the timber sale, as finally proposed, would materially adversely affect critical habitat for the spotted owl. In addition there is nothing in the record which can be used as a basis for our concluding that the timber sale would have a material adverse impact on such habitat, either within its boundaries or in the area surrounding the sales area. See In re Crooked Cedar Timber Sale, 83 IBLA 329, 331 (l984). Appellant has failed to establish that BLM has violated the September 1983 agreement.

Appellant contends that BLM has generally given inadequate considera- tion to the "cumulative impact" of the proposed timber sale by consider- ing the impact of past, present, and reasonably foreseeable future timber harvesting and associated activities on BLM and private lands. On the

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6/ In his December 1985 affidavit Bruce indicated that the Letz Creek potential SOMA would have "in excess of 1,000 acres" (Attachment C, Response). Thus an assumption that there is a 1,000-acre minimum requirement would have no effect upon the determination regarding the timber sale now before us.

7/ Appellant also argues that the Eugene District has not provided adequate funding for a monitoring program to be undertaken pursuant to the September 1983 agreement. The nature and extent of the BLM monitoring program is set out in an Oct. 25, 1984, letter to appellant from the District Manager (Exh. K, SOR). This monitoring commitment includes an unvalued portion of the District Biologist's time and the time of two volunteers. Id. Appel- lant has apparently overlooked the value of the time committed by the District biologist and the volunteers, as well as the fact that the efforts of BLM are to be coordinated with those of ODFW (Exh. H, at 4; see also Exh. A, SOR).

other hand, BLM argues that those factors were adequately considered and addressed in the EIS and EA it had prepared. After a review of the record we agree with BLM. See In re Humpy Mountain Timber Sale, 88 IBLA 7 (1985). The FEIS constitutes an overall assessment of the impact of the Eugene District's 10-year timber management plan on the human environment, "based upon past conditions and projected future harvesting" (Response at 4). In addition, the EA, which was tiered to the FEIS, addressed "measurable" environmental impacts not addressed in the FEIS 8/ (Response at 4). In particular, the cumulative impacts of past harvest, the proposed sale, and anticipated additional timber harvest on BLM lands and private lands on the Bottle Creek and Esmond Creek watersheds were considered and addressed in the EA document. See EA at 3.

Appellant also argues that BLM failed to consider the cumulative impact in terms of BLM's policy regarding "old growth strategy," "adjacent clearcuts," and "habitat maintenance" (SOR at 8). However, an examination of the record on appeal discloses that these issues were addressed when BLM considered the l0 alternatives for resource management set out in the Eugene District FEIS. See FEIS at 3-5. These alternatives included maxi- mum timber production, seral stage distribution, an east west corridor, and maximum ecosystem with withdrawal of old growth. In addition, BLM notes that during the course of its "annual review of timber sales * * * ODFW examines in detail the forage-cover interspersion for big game, the viability of habitat for old-growth dependent species and other issues related to the precise location and distribution of proposed timber sales" (Response at 5). We find that appellant has failed to identify any specific cumulative impact which had not been considered by BLM or addressed in the EA and related documents. See In re Upper Floras Timber Sale, 86 IBLA 296, 311 (1985).

Appellant contends that BLM failed to obtain a list of threatened and endangered species in the area of the proposed timber sale from the U.S. FWS, thus violating the provisions of section 7(c)(1) of the Endan- gered Species Act of 1973, as amended, 16 U.S.C. | 1536(c)(1) (1982). In its response BLM states that an inventory of threatened and endangered species of plants and animals was conducted for the lands subject to the

8/ The only specific argument advanced by appellant in support of this contention is that BLM had failed to consider the cumulative impacts of clearcutting in terms of "landslides," "blowdown," and "increased winter flooding and abnormally low river levels in summer" (SOR at 8). BLM responds that it considers the cumulative impact of these consequences of clearcutting as neither measurable nor significant. Appellant has advanced nothing which would indicate the contrary. Appellant also argues that BLM has failed to consider the impact of clearcutting the tracts on the Siuslaw River, a proposed wild and scenic river. In its response, BLM notes that the tracts are outside the river corridor being preserved pending the final determination of the status of the river (Response at 5). The visual impact of the proposed logging activity was addressed in the FEIS at pages 69-70, and the EA at page 5.

timber sale by the District botanist on June 26, 1984, and that inventory disclosed no threatened or endangered species. 9/ See Memorandum to Jon Stranjord from District Botanist, dated December 3, 1985. This inventory has satisfied the requirements of section 7(c)(1) of the Endangered Species Act of 1973, as this Act provision requires only that the "Secretary" shall be required by a Federal agency to provide "information whether any species which is listed or proposed to be listed may be present in the area of [the] proposed action." 16 U.S.C. | 1536(c)(1) (Supp. 1984). In fact, the District botanist notes that BLM furnishes FWS the information necessary to compile the list of threatened and endangered species for the area (Dec. 3, 1985, memorandum, supra).

Appellant next contends that BLM has failed to consider whether clear- cutting in the sales areas was "silviculturally essential" in compliance with the "Church Guidelines," and alleges that it is not (SOR at 9). In support of its contention, appellant submits a March 8, 1984, letter from Mark R. Smith, a forester with Woodland Management, Inc., in which Smith concludes that alternative cutting methods are available (Exh. S, SOR). Appellant also argues that, while selective cutting would not result in as large a yield in the short term, selective cutting would be more cost effi- cient, because the cost of carrying out certain of the mitigation measures would be avoided, and that selective cutting would yield a greater harvest in the long term (SOR at 10). Appellant submits a report of the results of timber harvest on two tracts "where clearcutting has not been used" to illustrate this point (SOR at 11). These exhibits indicate considerable production over a period extending from 1964 through 1980 and from 1955 through 1975, and an associated increase in available timber (Exhs. W and X). Appellant contends that these exhibits demonstrate "real" sustained yield management (SOR at 12).

In its response BLM states that it considers clearcutting of the sales area to be silviculturally essential. BLM bases this conclusion on analy- ses of the various alternative timber harvest methods, including selective cutting, which were set forth in the "1975 Timber Management FEIS" (Response at 7; see also Curtin Mitchell, supra at 279). BLM states that when prepar-ing the FEIS it determined that clearcutting is silviculturally essential "in most areas where Douglas fir is the dominant tree species and the steep-ness of the slope requires cable yarding of harvested trees" (Response at 7). The record indicates that the sales areas are composed predominantly of Douglas fir. In his September 1985 decision the District Manager stated

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9/ Appellant challenges the qualifications of the District botanist. We find that the statement submitted by Curtis shows him to be sufficiently qualified to conduct the inventory (Attachment F, Response). Appellant argues that the failure to state the inventory in the EA results in a reversible error. We also find that the inventory results should have been noted in the EA. However, considering the findings that the area contained no threatened or endangered species, the failure to state this fact is not of such consequence that it should be considered a reversible error.

that clearcutting had been deemed "necessary for rehabilitation of the site." We also note that the EA clearly indicates that BLM had considered the alternatives of partial cutting and commercial thinning at each sales unit. We find that appellant has demonstrated that selective cutting is an alternative to clearcutting, but are not persuaded to find that clearcut-ting is not silviculturally essential in the sales sites. Appellant has not demonstrated that the two tracts used to illustrate benefits of timber harvest by means other than clearcutting are comparable to the old growth characteristics of the sales areas. See, Table 1, EA; Exh. W, at 2; Lane County Audubon Society, 55 IBLA 171, 180 (1981). Appellant has also failed to demonstrate that clearcutting of the sales areas would prove to be more costly than the alternatives it advanced.

It should be noted at this juncture that the "Church Guidelines" adopted in March 1972 by the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs are policy guidelines, are not equivalent to regulations, and therefore are not binding on BLM. In re Upper Floras Timber Sale, supra at 301, 302. BLM has clearly given appro- priate consideration to compliance with these guidelines.

Appellant contends that BLM has failed to provide adequate watershed protection, thereby violating various Federal statutes, the Church guide- lines, and executive orders. 10/ It specifically argues that BLM is apply- ing a water quality standard for suspended sediments which does not conform with State standards, and has failed to adequately protect Order 1 and 2 streams in sales units 1 and 2 with buffer zones and full suspension yard- ing. In support of this contention appellant refers to a June 11, 1984, letter to BLM from ODFW, which states that Order 1 and 2 streams should be provided with "better protection": "Log yarding through these headwater streams, even in winter, and lack of buffers are commonly permitted by recent and planned sales" (Exh. AA at 1). In addition ODFW states that the "'25 ppm or 50 NTU' suspended sediment standard" does "not meet state or federal regulations." Id. at 2.

In response, BLM contends that it has provided adequate protection for Order 1 and 2 streams at the timber sales sites by requiring directional falling of the timber away from the streams and by requiring partial sus- pension of the logs over the stream during yarding (Response at 8). BLM also notes that unit 2 will have a 20-foot buffer and full suspension yarding along 70 percent of the length of the stream through the unit. Id. See Decision Record at 2. In light of these facts we find appellant has failed to establish that the timber harvest in the sales areas will result in either a significant environmental impact or a violation of Federal or State statutes or regulations, the Church guidelines, or any executive

10/ Appellant makes a general allegation that the water-quality monitor- ing program is "grossly inadequate," but submits nothing in support of this allegation (SOR at 14). In response, BLM states that "[s]amples for turbidity, temperature, flow, suspended sediment, and conductivity are taken continuously and include all storm events" (Response at 8; see ROD at 28).

order, when the design features called for in the decision are taken into consideration. We note that the FEIS at page 53 specifically addressed the protection of Order 1 and 2 streams with a finding that the features above described would, singly or in combination, serve to meet the requirement.

Appellant contends that BLM has not justified clearcutting 91 acres in "adjacent" units 1 and 2, despite a BLM policy limiting clearcut units to 40 acres and the "Church Report" which refers to a Forest Service policy limiting clearcut units to 25 acres (SOR at 16). BLM acknowledges that it is the general policy in the District to limit clearcuts to 40 acres, but notes that this general policy does not preclude it from clearcutting larger areas. See Exh. EE, SOR. As a basis for this variance from the general policy, BLM notes that units 1 and 2 are "physically distinct" areas which are separated by a ridgetop road. BLM states that "[e]ach has different environmental impacts requiring separate administration" (Response at 9). The primary basis of this distinction, according to BLM, is that each unit is located in a separate drainage, resulting in the units having "distinct microclimates" calling for different mitigation measures and separate logging activities. Id. at 10. BLM concludes:

> By the criteria of forest management, therefore, the 91-acre area must be considered as two (or more) adjacent harvest units. It is the goal of the Lorane Resource Area to schedule harvest of adjacent units at intervals of five years or greater to diminish visual, watershed and other impacts, but more compelling environ- mental reasons may justify a shorter interval. For example, the harvest deferrals under the BLM-ODFW agreement has [sic] reduced the available land base on which each year's sales may be distrib-uted. In this case the two units had undergone extensive salvage removal in 1978, and residual stands were decadent and poor in timber quality and density. Prudent timber management requires that these stands be returned to full site productivity as soon as possible, and the topographical division of the units made the adverse impacts of simultaneous scheduling insignificant.

Id. We conclude that BLM has justified the concurrent clearcutting of units 1 and 2.

Finally, appellant contends that there is no evidence that BLM has consulted the State Historic Preservation Officer (SHPO) regarding the cultural resources of the sales sites, as required by 36 CFR 800.4(a)(1). See Curtin Mitchell, supra at 282-84. However, the September 1985 decision by the District Manager specifically states that "appropriate clearance" had been obtained from SHPO. This statement is supported by attachment H to the BLM response. In addition, the record also indicates that a BLM cultural resources specialist had conducted a cultural resource survey of the sales areas. See Cultural Resource Surveys, dated December 7, 1983, and March 1, 1984.

We conclude that the BLM decision to proceed with the Letz Boogie timber sale was based upon adequate consideration of all relevant factors

and was in accordance with applicable law and policy. As a result we also find that BLM properly denied appellant's protest. Appellant has failed to meet its burden of showing error in BLM's decision. In re Upper Floras Timber Sale, supra.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

John H. Kelly
Administrative Judge